2002

Tod's Travel Center Inc and John P. Trout v. Jenkins Oil Company : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TOD'S TRAVEL CENTER, INC and
JOHN P TROUT,

Appellants,

v.

JENKINS OIL COMPANY, INC ,

Appellee

Case No. 20020557-CA

APPELLEE JENKINS OIL COMPANY, INC.'S BRIEF

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I. JURISDICTION

The court of appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

II. ISSUES AND STANDARDS OF REVIEW

ISSUE 1: The trial court acted well within its discretion when it struck Tod's Travel Center's and John P. Trout's complaint and answer to counter-claim and entered default judgment in favor of Jenkins Oil.

This is a collection case. Jenkins Oil delivered gasoline to Tod's Travel Center, a Panguitch, Utah gas station. Tod's did not pay. Trout personally guaranteed Tod's payment for the gas.

Under Rules 16(d) and 37(b)(2)(C), Utah Rules of Civil Procedure, a judge may strike the pleadings of, or impose a default judgment against, any party that is substantially unprepared to participate in a pretrial conference or that participates in bad faith. On three separate occasions prior to the May 23, 2002 pretrial conference, the attorney representing Trout and the Travel Center withdrew as plaintiffs' counsel on the eve of trial. After each withdrawal, plaintiffs' new attorney spent several months reviewing the record and preparing plaintiffs' case, delaying trial year after year.

Frustrated by plaintiffs' persistent dilatory tactics, the trial court warned plaintiffs in November, 2001 they would face sanctions, including possibly striking their complaint and the entry of default judgment against them, if they were thereafter unprepared to participate in the trial process or if they again fired their attorney. (R. 513-14) Despite

this warning, plaintiffs refused to provide Jenkins Oil with lists of exhibits or witnesses to help prepare a pretrial order for the May, 2002 pretrial conference, and plaintiffs fired their fourth attorney on May 22, 2002. Accordingly, the trial court struck plaintiffs' complaint and answer to Jenkins Oil's counter-claim, and entered default judgment against plaintiffs for $301,769.82. (R. 800) Plaintiffs' disobedience to Judge Mower's instructions, their years of willful dilatory conduct, and the Rules of Civil Procedure themselves show Judge Mower acted well within his discretion.

In their brief, Trout and the Travel Center did not indicate how they preserved this issue for appeal, as required by Rule 24(a)(5), Utah Rules of Appellate Procedure. Therefore, Jenkins Oil independently reviewed the record and determined the issue was preserved by plaintiffs' motion to set aside the default judgment. (R. 947-953)

A trial court's decision to impose Rule 37(b)(2)(C) sanctions is reviewed under an abuse of discretion standard. Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 262 (Utah Ct. App. 1997). Appellate courts "will only conclude the trial court abused its discretion if the ruling was beyond the limits of reasonability." Tolman v. Winchester Hills Co., Inc., 912 P.2d 457, 462 (Utah Ct. App. 1996) (internal quotation omitted). See also State v. Pena, 869 P.2d 932, 936-39 (Utah 1994).

ISSUE 2: Judge Mower complied with Utah's Code of Judicial Conduct when he presided over the case even if he had previously represented one of the plaintiffs.

The Travel Center and Trout assert Judge Mower should have recused himself because Judge Mower allegedly represented one of the plaintiffs in a civil matter before his judicial appointment. This representation, they allege, created a "relationship [that] left Judge Mower privy to personal details and a personal relationship that reasonably could have affected his decisions in this lawsuit." (Appellants' Br. at 3, ¶ 2.)

As with the first issue, the Travel Center and Trout do not indicate where they preserved this issue for appeal. Although Jenkins Oil reviewed every pleading the plaintiffs filed since the original March, 1997 complaint, it could not determine where plaintiffs preserved, by affidavit, motion, or otherwise, the issue of Judge Mower's alleged bias. Because Utah courts "observe the 'general rule that issues not raised at trial cannot be argued for the first time on appeal[,]'" this Court should summarily decline to address this issue. Diversified Holdings, L.C. v. Turner, 2002 UT 129, ¶ 8, 63 P.3d 686 (quoting Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996)). See also Taghipour v. Jerez, 2001 UT App 139, ¶ 18, 26 P.3d 885; Ellis v. Swensen, 2000 UT 101, ¶ 30, 16 P.3d 1233; State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346.

Even though the Travel Center and Trout apparently did not preserve this issue for appeal, Jenkins Oil will respond on the merits as best it can. "Determining whether a trial judge committed error by failing to recuse himself or herself under the Utah Code of

Judicial Conduct...and our accompanying case law is a question of law, and [appellate courts] review such questions for correctness." State v. Alonzo, 973 P.2d 975, 979 (Utah 1998). See also State v. Tueller, 2001 UT App 317, ¶ 7, 37 P.3d 1180. Rule 63(b), Utah Rules of Civil Procedure, requires "the party asserting bias to file an affidavit that shall state the facts and the reasons for the belief that such bias or prejudice exists." State in the Interest of M.L., 965 P.2d 551, 556 (Utah Ct. App. 1998). "Utah cases have consistently required that the basis alleged in the affidavit have some basis in fact and be grounded on more than mere conjecture and speculation." Id.

III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS DETERMINATIVE OR OF CENTRAL IMPORTANCE TO THE APPEAL

1. Rule 16(d), Utah Rules of Civil Procedure

Pretrial conferences, scheduling, and management conferences: Sanctions

> If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, and among others, any of the orders in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing that party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 16(d), Utah Rules of Civil Procedure.

2. Rule 37(b)(2)(C), Utah Rules of Civil Procedure

Failure to make or cooperate in discovery; Sanctions by court in which action is pending

> [I]f a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others make the following:
>
> (C) an order striking out the pleadings or parts thereof,... dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

Rule 37(b)(2)(C), Utah Rules of Civil Procedure.

3. Utah Code of Judicial Conduct Canon, 3E(1)(a)

Disqualification

> A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

Utah Code of Judicial Conduct, Canon 3E(1)(a).

IV. STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings, and Disposition Below

This is a collections dispute between a petroleum products supplier, Jenkins Oil Co., Inc. ("Jenkins Oil"), and its customers Tod's Travel Center, Inc. ("the Travel Center") and personal guarantor John P. Trout ("Trout"). The Travel Center's and Trout's March, 1997 complaint alleged breach of contract, breach of the implied covenant

of good faith and fair dealing, and fraud, among other claims. (R. 1-33) Jenkins Oil counterclaimed for the money it was owed. (R. 68-76)

After five years of pretrial proceedings, including four withdrawals by plaintiffs' attorneys, three notices of intent to dismiss for failure to prosecute, and three unsuccessful pretrial conferences, Judge Mower, dismissed the Travel Center's and Trout's complaint on June 6, 2002. (R. 800) Judge Mower also struck plaintiffs' answer to Jenkins Oil's counterclaim, and entered default judgment in favor of Jenkins Oil for $301,769.82, including principal, interest, attorney's fees, and costs. (Id.)

2. Statement of Facts

A. The Travel Center and Jenkins Oil's Pre-Lawsuit Dealings; Trout Signs a Personal Guarantee of Payment

In 1990, Trout owned Tod's Travel Center, Inc., a gasoline retailer located in Panguitch, Utah. (R. 1-2) On or about August 1, 1990, the Travel Center expanded its business. (R. 2 at ¶ 5) The Travel Center switched from retailing Phillips 66 products to Texaco. (Id. at ¶ 6) The Travel Center purchased Texaco products from Jenkins Oil pursuant to an oral agreement. (Id. at ¶ 7) In August, 1991, the Travel Center memorialized its oral agreements with Texaco and Jenkins Oil by signing a written contract. (Id. at ¶ 10; R. 18-28) Jenkins Oil agreed to provide motor fuel products to the Travel Center on credit. (R. 32; R. 3 at ¶ 8) Trout personally guaranteed to pay Jenkins Oil for motor fuel products it supplied to the Travel Center. (R. 30) The personal

guarantee stated interest would accrue on any unpaid balance at an annual rate of 18%. (Id.)

Pursuant to its oral and written agreement with the Travel Center, Jenkins Oil provided Texaco gas and oil to the Travel Center. (R. 3 at ¶ 8) The Travel Center did not pay Jenkins Oil; as of October, 1997, the Travel Center's principal balance due Jenkins Oil was $142,606.25. (R. 675) Between October, 1997 and May, 2002, $119,091.58 of interest had accrued. (Id.) Thus, two weeks before Judge Mower entered the default judgment against the Travel Center and Trout, plaintiffs owed Jenkins Oil a total of $261,697.83. (Id.)

B. During Five Years of Pretrial Proceedings, the Court Filed Three Notices of Intent to Dismiss for Failure to Prosecute, and Trout Persistently Terminated His Attorneys on the Eve of Trial

Judge Mower acted well within his discretion when he sanctioned the Travel Center and Trout who spent five years switching lawyers, disobeying court orders, and stalling.

1. The Travel Center and Trout's complaint was filed by attorney Marlin Bates on March 10, 1997. (R. 1-32)

2. A year later, on March 20, 1998, the court filed its first notice of intent to dismiss for failure to prosecute. (R. 157)

3. On March 26, 1998, Trout and the Travel Center appointed their second lawyer, Dale Sessions. (R. 159)

4. Another year later, on January 20, 1999, the court filed its second notice of intent to dismiss for failure to prosecute. (R. 164)

5. Dale Sessions withdrew as Counsel on January 22, 1999. (R. 166)

6. On February 4, 1999, Trout and the Travel Center's first attorney Marlin Bates filed a Withdrawal of Counsel. (R. 169-70)

7. After Jenkins Oil filed a notice to appoint a successor attorney, Dale Sessions, appellant's second attorney, again filed a notice of appearance on March 29, 1999. (R. 172; 176)

8. On October 29, 1999, the court ordered that counsel be present at a final pretrial conference scheduled for January 6, 2000. (R. 194)

9. On December 15, 1999, attorney Sessions again withdrew as counsel. (R. 208)

10. On February 3, 2000, the court ordered that plaintiffs obtain new counsel by March 1, 2000. Sanctions against plaintiffs were taken under advisement. (R. 650)

11. On February 28, 2000, plaintiffs' third attorney, Aaron Prisbrey, entered his appearance. (R. 215)

12. On November 17, 2000, the trial court filed its third notice of intent to dismiss for failure to prosecute. (R. 217)

13. On February 1, 2001, plaintiffs' attorney represented that he would be ready for trial after April 1, 2001. Pretrial was scheduled for April 26, 2001. Jury trial was set for May 18 - 23, 2001. (R. 234)

14. After a failed interlocutory appeal, jury trial was set for December 17, 18, 21, 2001. (R. 491)

15. On October 24, 2001, attorney Prisbrey, plaintiffs' third attorney, moved to withdraw because he had not been paid. (R. 493)

16. At a status hearing on November 8, 2001, plaintiffs represented that they would be ready for trial in December 2001. (R. 509)

17. In its November 19, 2001 order granting attorney Prisbrey's motion to withdraw, the court noted that it previously warned Trout and the Travel Center that any future withdrawal of counsel would be subject to sanctions by the court. (R. 513-14)

18. On December 4, 2001, attorney Nelson Abbott entered his appearance for plaintiffs. (R. 516)

19. On December 10, 2001, plaintiffs, through Mr. Abbott, moved to continue the trial. (R. 520-33)

20. On December 12, 2001, the court continued the trial date to June 25 - 28, 2002. (R. 534)

21. On December 20, 2001, the court sanctioned plaintiffs $7,500.00 for attorneys' fees for the delay in causing Jenkins Oil to have to hire new counsel as Jenkin's counsel, Scott Burns, was planning to move to Washington, D.C. (R. 577-79)

22. On May 3, 2002 attorney Burns withdrew as Jenkins Oil's counsel. Attorney Andrew Morse replaced attorney Burns as defendant's counsel. (R. 590)

23. On May 3, 2002, Mr. Morse filed a Rule 26 Request for Supplementation with plaintiffs' counsel. In particular, Jenkins Oil wanted a list of plaintiffs' witnesses and exhibits in order to prepare a Pretrial Order. On that same day, Mr. Morse faxed a letter to Mr. Nelson Abbott, plaintiffs' counsel, asking for a list of witnesses and exhibits in order to prepare a Pretrial Order. (R. 593; R. 662-664)

24. On May 13, 2002, Jenkins Oil's counsel faxed another letter to Mr. Abbott asking him to e-mail any inserts plaintiffs would like to be included in the final Pretrial Order that Jenkins Oil's counsel was preparing. (R. 664)

25. On May 15, 2002, Mr. Morse received a letter from Nelson Abbott, but it did not include the requested witnesses and exhibits lists, nor did it include any inserts for the Pretrial Order. (R. 666-67)

26. On May 16, 2002, Mr. Morse faxed another letter to Nelson Abbott requesting his participation in drafting the Pretrial Order, and, for the third time, asking for a list of witnesses and exhibits. (R. 669)

27. On Tuesday, May 21, 2002, Nelson Abbott called Mr. Morse and in the course of that conversation, refused to supply a list of witnesses and exhibits to be included in the Pretrial Order. Mr. Trout was with Mr. Abbott during the course of the telephone call. (R. 671-72)

28. At 8:00 a.m. on May 22, 2002, the day before the final pretrial conference, attorney Abbott filed a motion to withdraw as plaintiffs' counsel. (R. 607)

29. At the pretrial on May 23, 2002, the court granted Mr. Abbott's motion to withdraw, leaving Tod's Travel Center, Inc. unrepresented by counsel. (R. 770-71; R. 799)

30. The court found John Trout, appearing pro se, produced no witness list or exhibit list or exhibits at the pre trial, and he was otherwise unprepared to participate in the pre trial or trial. (R. 797 at ¶ 3)

31. The court found that under Rule 16(d), plaintiffs were unprepared to participate in the pretrial conference or trial. (Id. at ¶ 4)

32. The court further found that at a hearing held in December, 2001, plaintiffs' counsel asked for a continuance in order to give him more time to prepare for trial. At that time the court warned plaintiffs that if they persisted in these dilatory tactics they would be punished with sanctions up to and including the striking of their Complaint and their Answer to the Counterclaim, and by the entry of a judgment against them. The court found that the plaintiffs repeatedly failed to participate in pretrial conferences and proceedings. The court found that the plaintiffs' actions were dilatory, intentional, and willful. (Id. at ¶ 5)

33. The court found that the plaintiffs' tactics frustrated the judicial process. The court further found that the only appropriate sanction was to strike the plaintiffs' Complaint, to strike the plaintiffs' Answer to the defendant's Counterclaim, and to enter a default judgment against the plaintiffs, jointly and severally, in the amount of $301,769.82 -- what plaintiffs owed Jenkins Oil. (Id. at ¶ 6)

34. The amount of the default judgment was based on the Kelly Johnson accounting and the attorneys' fees affidavits and prior sanction order attached to defendants' Rule 16(d) Motion for Sanctions. (Id.; R. 674-761; R. 792-93).

V. SUMMARY OF ARGUMENTS

This Court should disregard appellants' brief because it fails to conform to the requirements of Rule 24, Utah Rules of Appellate Procedure. The brief does not state where in the record appellants preserved their two issues for appeal, as Rules 24(a)(5)(A-B) require. The brief incorrectly states the standard of appellate review for the second issue, in violation of Rule 24(a)(5), and it does not include record citations, as required by Rules 24(a)(7, 9) and 24(e). It is bereft of legal argument, or facts for that matter.

As such, this Court may justifiably decline to address the two issues Trout and the Travel Center raise. Jenkins Oil, however, will address each issue's merits in case this Court decides to consider appellants' brief in 'the interests of justice.'

Judge Mower's order imposing sanctions was warranted and well within the limits of his discretion. By repeatedly firing his attorneys on the eve of trial, Trout intentionally delayed this case's resolution for over five years. In November, 2001, after three 'midnight withdrawals' by Trout's attorneys, Judge Mower explicitly warned Trout that any future withdrawal of counsel would subject Trout and the Travel Center to sanctions; Trout nevertheless fired attorney Nelson Abbott the day before the May 23, 2002 pretrial conference. Trout disregarded Judge Mower's warning, and by so doing, invited Judge

Mower to declare "enough is enough" and impose sanctions specifically listed in the Utah Rules of Civil Procedure.

Additionally, Judge Mower correctly remained as judge throughout the proceedings. This issue is difficult to address because Trout and the Travel Center do not state when they raised this issue, how Judge Mower responded, how Judge Mower's alleged bias manifested itself, or how his alleged bias and the trial's result are connected. The pretrial proceedings unequivocally demonstrate Judge Mower was not biased towards Trout and the Travel Center. In fact, Judge Mower repeatedly allowed appellants' attorneys to withdraw on the eve of trial, orders potentially prejudicing Jenkins Oil. In December, 2001, Judge Mower continued the trial six months so Trout's fourth attorney could prepare his case, even though Trout assured the court in November, 2001 that the Travel Center would be ready for trial in December. Judge Mower entered these orders, and numerous others, at Trout's request and for Trout's benefit. Thus, without additional factual information from Trout and the Travel Center, Jenkins Oil fails to see any evidence supporting appellants' claim that Judge Mower was biased and should have recused himself.

VI. ARGUMENT

1. Trout's and the Travel Center's Brief Should Be Stricken or Disregarded Because it Does Not Comply with Rule 24, Utah Rules of Appellate Procedure

This Court may strike or disregard appellants' brief because it fails to conform to Rule 24, Utah Rules of Appellate Procedure. Utah's appellate courts have repeatedly

stated they "will assume the correctness of the judgment below if the appellant fails to make a 'concise statement of the facts and citation of the pages in the record where those facts are supported.'" Phillips v. Hatfield, 904 P.2d 1108, 1109 (Utah Ct. App. 1995) (quoting Koulis v. Standard Oil Co., 746 P.2d 1182, 1184 (Utah Ct. App. 1987)).[1] Moreover, it is the Utah Court of Appeals's "prerogative to affirm the lower court decision solely on the basis of failure to comply with the Utah Rules of Appellate Procedure." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 n.1 (Utah Ct. App. 1991).

This Court struck the appellant's brief in Steele v. Bd. of Review of the Indus. Comm'n of Utah, 845 P.2d 960, 962 (Utah Ct. App. 1993), because it did "not contain the requisite statement of facts. Moreover, [appellant's] cursory statement of the case [did] not contain any citations to the record. Likewise, in the argument portion of her brief, [appellant] fail[ed] to provide citations to any parts of the record relied upon therein." In State v. Price, 827 P.2d 247, 250 (Utah Ct. App. 1992), this Court also disregarded the appellant's brief because it was "clearly deficient under the provisions of Rule 24." Among other shortcomings, the appellant's brief in Price "fail[ed] to set forth...the appropriate standard of review for each issue with supporting authority [and]... fail[ed] to

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[1] See also Steele v. Bd. of Review of the Indus. Comm'n of Utah, 845 P.2d 960, 962 (Utah Ct. App. 1993) ("If a party fails to provide a statement of the facts along with a citation to the record where those facts are supported, we will assume the correctness of the judgment."); State v. Price, 827 P.2d 247, 249 (Utah Ct. App. 1992) ("We have routinely refused to consider arguments which do not include a statement of the facts properly supported by citations to the record.").

provide a statement of the relevant facts properly documented by citations to the record." Id. Additionally, the Price appellant's brief's "'argument' [did] not identify any error by the trial court, refer to the facts or the record, or cite applicable authority, much less provide any meaningful factual or legal analysis." Id. Thus, Price's appellant's brief did "not enable [the appellate court] to locate errors in the record or demonstrate under applicable authorities why the errors necessitate[d] reversal." Id. (quotations omitted).

As in Steele and Price, Trout's and the Travel Center's brief does not contain a statement of the facts supported by citations to the record. See Appellant's Br. at 3-4. Both its cursory statement of the case and its argument section are void of record citations, see id. at 2-3, 5-8, and it fails to set forth the correct standard of review for the second issue. See id. at 2. Appellants' brief also incorrectly states which Utah Code section confers jurisdiction on this Court. See id. at 1. Trout and the Travel Center's brief does not "enable" Jenkins Oil or this Court "to locate errors in the record or demonstrate under applicable authorities why the errors necessitate reversal[,]" Price, 827 P.2d at 250. Thus, Jenkins Oil asks the Court to disregard or strike appellants' brief, affirm the trial court's judgment, and award attorney fees under Rule 24(j), Utah Rules of Appellate Procedure. Jenkins Oil, however, recognizes Utah's appellate courts "are not obligated to strike or disregard a marginal or inadequate brief[;]" since this Court may "choose to further address [appellants'] arguments in the interests of justice[,]" Jenkins Oil will therefore brief both issues Trout and the Travel Center raise. State v. Gamblin, 2000 UT 44, ¶ 8, 1 P.3d 1108.

2. Trout's Appeal Is Frivolous, and this Court Should Award Jenkins Oil Attorney Fees under Rule 33(a), Utah Rules of Appellate Procedure

Trout's brief is "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law[.]" It is therefore frivolous under Rule 33(b), Utah R. App. P. Jenkins Oil therefore requests this Court award it reasonable attorney fees as provided in Rule 33(a), Utah R. App. P.

"Under Utah Rules of Appellate Procedure 33, a party is entitled to attorney fees when an 'appeal...is...frivolous...[A] frivolous appeal...is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.'" Warner v. DMG Color, Inc., 2000 UT 102, ¶ 24, 20 P.3d 686 (quoting Utah R. App. P. 33(a), (b)). This Court previously stated "[s]anctions are appropriate for appeals 'obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment.'" Farrell v. Porter, 830 P.2d 299, 302 (Utah Ct. App. 1992) (quoting Maughan v. Maughan, 770 P.2d 156, 162 (Utah Ct. App. 1989)). This Court has also ruled that "sanctions should be imposed when 'an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs of litigation; and dissipation of the time and resources of the Law Court.'" Porco v. Porco, 752 P.2d 365, 369 (Utah Ct. App. 1988) (quoting Auburn Harpswell Ass'n v. Day, 438 A.2d 234, 239 (Me. 1981)).

Utah's appellate courts have found appeals to be frivolous when "[t]he record is devoid of any relevant, admissible evidence" supporting an appellant's arguments, Hunt v. Hurst, 785 P.2d 414, 416 (Utah 1990), or when there is a "total lack of basis in fact for the claims against" an appellee. Gildea v. Guardian Title Co. of Utah, 970 P.2d 1265, 1272 (Utah 1998). Similarly, this Court has said an appeal that is "merely a continuation of plaintiff's efforts to harass defendant" is also frivolous. Porco, 752 P.2d at 369.

Trout's brief cites no relevant, admissible evidence in support of his claims. It is without merit and has no reasonable likelihood of success. The total lack of basis in fact for the issues Trout appeals suggests that it is a continuation of Trout's five-year campaign to harass Jenkins Oil, and avoid the debt. Jenkins Oil should be awarded its attorney fees incurred in preparing its appellee brief.

Jenkins Oil "recognize[s] that sanctions for frivolous appeals should only be applied in egregious cases[.]" Id. The undisputable lack of factual support for Trout's claims and his incessant dilatory behavior suggest this case fits squarely within those parameters. As such, an order under Rule 33, Utah R. App. P, awarding Jenkins Oil its attorney fees is entirely appropriate.

3. Judge Mower's Order Sanctioning Trout and the Travel Center under Rules 16(d) and 37(b)(2)(C), Utah Rules of Civil Procedure, Was Well Within His Discretion

Trout and the Travel Center fired their fourth attorney on May 22, 2002, the day before the final pretrial conference, despite Judge Mower's November 19, 2001 warning that the "future withdrawal of counsel would be subject to sanctions by the court."

(R. 513-14) Because Trout's actions left corporate plaintiff Tod's Travel Center, Inc. "unrepresented by counsel[,]" (R. 797 at ¶ 2), and because pro se plaintiff Trout did not produce a "witness list or exhibit list or exhibits at the pre trial" (Id. at ¶ 3), the trial court found that, "[u]nder Rule 16(d), plaintiffs were unprepared to participate in the pre trial or trial." (Id. at ¶ 4) The trial court also found Trout's actions were "dilatory[,]... intentional and willful" and that Trout's "tactics have frustrated the judicial process." (Id. at ¶¶ 5-6) Trout disregarded Judge Mower's warning and failed to comply with Rule 16(d), Utah R. Civ. P. Accordingly, the trial court sanctioned appellants as allowed in Rule 37(b)(2)(C) by striking their complaint and answer to counter-claim and entering a default judgment against them. (See R. 800 at ¶¶ 3-4) These actions were well within Judge Mower's discretion.

The facts indicate willful dilatory conduct. Trout repeatedly engaged in bad faith, persistent, dilatory tactics that frustrated the judicial process for more than five years. Just one day before the finial pretrial conference, Trout again fired his lawyer for the fourth time. (See R. 607) As the trial court stated, "enough is enough." (R.1021 at 23.) Trout repeatedly switched lawyers in order to delay trial, refused to participate in the preparation of Pretrial Orders, and was substantially unprepared to participate in each and every pretrial conference before the trial court, all in an attempt to avoid a judgment. Justice demands that this type of behavior be sanctioned, and Trout's conduct shows Judge Mower acted within the "limits of reasonability" when he sanctioned Trout and the Travel Center. Tolman, 912 P.2d at 462. Moreover, appellants themselves note "it is

plain and clear that entering a default judgment is within the authority of the Court." Appellants' Br. at 5.

In appellants' brief, they assert Trout had in his possession at the pretrial conference the witness list and trial exhibit list needed and would have provided them, but for some unknown reason his attorney openly refused his direct order to turn the list over to Jenkins Oil Company. Appellants' Br. at 6. Mr. Trout's story is unbelievable. Without getting into Mr. Trout's unusual story the question still remains: Where is this list? To this day, Jenkins Oil Company has never received a witness or exhibit list.

The truth is probably better represented by the Court's findings of fact in this case. The Court found that Trout, "appearing pro se, produced no witness list or exhibit list or exhibits at the pretrial" and that he was "unprepared to participate in the pretrial or trial." (R. 797 at ¶ 3) The court twice gave Trout one last chance to come to court prepared for trial. (Id. at ¶ 5) The last one was given in December 2001. (Id.) Trout was ordered to stop his dilatory tactics and to participate in pretrial conferences and to come to proceedings prepared to move forward. (Id.) Trout willfully failed to comply with these orders, in order to avoid the debt he owed Jenkins Oil.

To support a finding of willfulness, there need only be "any intentional failure as distinguished from involuntary non-compliance. No wrongful intent need be shown. Tuck v. Godfrey, 981 P.2d 407, 411 (Utah Ct. App. 1999). Once the threshold is met, the choice of an appropriate sanction is primarily the responsibility of the trial court. Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1997). Here the record is replete with

repeated intentional dilatory tactics. Trout sought three delays to get another lawyer to take the case and prepare for trial. The court was very patient with Trout, repeatedly giving him the benefit of the doubt and allowing him yet more time to get another lawyer and prepare for trial. Yet despite these allowances Trout once again failed to comply with the Court's order and on the day of the final pretrial, he was once again not prepared, nor had he made any effort to prepare.

Rule 16(d) states, "if a party or party's attorney is substantially unprepared to participate in the [pretrial] conference, or if a party or party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may make such orders with regard thereto as are just, in among others, any of the orders provided in Rule 37(b)(2)(B)(C), (D)." Utah R. Civ. P. 16(d). Trout's conduct fits squarely within the parameter of Rule 16(d). Trout was repeatedly and intentionally "substantially unprepared to participate in the [pretrial] conference." He failed repeatedly and intentionally to participate in the pretrial "in good faith." The court correctly entered sanctions under Rule 37(b)(2)(C) by striking his complaint, striking his answer to the counterclaim, and entering a judgment equal to the amounts owing.

The sanction in this case were not unusual. Utah law is replete with instances like this one where courts dismiss a claim or strike an answer for behavior less egregious than Trout's behavior. See, e.g., Gorostieta v. Parkinson, 2000 UT 99, 17 P.3d 1110; Tuck v. Godfrey, 981 P.2d 407, 411 (Utah Ct. App. 1999); Hails v. Oldroyd, 2000 UT App 75, 999 P.2d 588; Preston & Chambers, P.C. v. Koller, 943 P.2d 260 (Utah Ct. App. 1997).

Trout was ordered to stop his dilatory tactics, participate in pretrial conferences, and to come to proceedings prepared to move forward. (R. 797 at ¶ 5) Trout failed to comply with these orders and instead willfully persisted in refusing to provide witness and/or exhibit lists, continued to come to court unprepared, and fired his attorney fourth attorney on the eve of trial. These facts show the court acted within its sound discretion when it sanctioned Trout and put an end to his inexcusable behavior.

4. Judge Mower Followed the Code of Judicial Conduct Guidelines When He Heard the Case

A. This Issue Should Be Disregarded Because Trout's Brief Does Not Show, and Jenkins Oil Could Not Find, Where in the Record Trout Preserved This Issue for Appeal

Before addressing this issue's merits, Jenkins Oil notes appellants' brief did not, as Rules 24(a)(5)(A-B), Utah Rules of Appellate Procedure require, provide a "citation to the record showing that the issue was preserved in the trial court; or a statement of grounds for seeking review of an issue not preserved in the trial court." Since Trout and the Travel Center neglected to include this citation, Jenkins Oil independently reviewed the record to determine whether Trout preserved this issue for appeal. Jenkins Oil's search was unsuccessful. It appears this issue was not preserved in the trial court.

Utah appellate jurisprudence clearly states "issues not raised at trial cannot be argued for the first time on appeal." Diversified Holdings, L.C. v. Turner, 2002 UT 129, ¶ 8, 63 P.3d 686 (quoting Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996)). See also Taghipour v. Jerez, 2001 UT App 139, ¶ 18, 26 P.3d 885; Ellis v. Swensen, 2000 UT 101,

¶ 30, 16 P.3d 1233; State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346. Because Trout and the Travel Center did not indicate how they preserved this issue in the trial court, Jenkins Oil urges this Court to disregard this portion of appellants' brief.

B. Judge Mower Acted Within the Scope of Utah's Code of Judicial Conduct When He Heard the Case

Without citing any facts that show an indication of bias, Trout and the Travel Center argue Judge Mower should have recused himself from the case because he "represented one of the Plaintiffs in a civil action prior to being appointed to the bench." Appellant's Br. at 8. Appellants further contend "it doesn't [sic] matter" whether this "relationship create[d] a personal bias or prejudice between Judge Mower and the Plaintiff" because "[w]hat matters is whether that relationship might reasonably have created circumstances indicating bias or prejudice." Id. This argument contradicts Utah precedent and is without merit.

"Determining whether a trial judge committed error by failing to recuse himself or herself under the Utah Code of Judicial Conduct...and our accompanying case law is a question of law, and [appellate courts] review such questions for correctness." State v. Alonzo, 973 P.2d 975, 979 (Utah 1998). See also State v. Tueller, 2001 UT App 317, ¶ 7, 37 P.3d 1180.

Initially, Jenkins Oil notes the difficulty it faces addressing this issue because appellants' argument lacks a procedural or factual foundation. While Utah precedent is replete with cases reviewing a judge's failure to recuse himself or herself, those cases all

stem from a judge's actual denial of one party's formal request for disqualification.[2] Here, the record does not reveal Trout filed any motion, Rule 63(b) affidavit, or other formal or informal request that Judge Mower recuse himself. As such, neither Judge Mower nor his colleagues addressed the legal sufficiency of Trout's bias claim; thus, this Court must attempt to address the alleged impropriety of Judge Mower's inaction.

Additionally, appellants misconstrue the Code of Judicial Conduct's provisions that govern disqualification as requiring "only circumstances indicating questionable impartiality" and mischaracterize the Code's provisions as "a very low threshold." Appellants' Br. at 8 (emphasis added). The Code directs that "a judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned[.]" Utah Code of Judicial Conduct, Canon 3E(1) (emphasis added). This Court previously determined that "Utah courts have not specifically interpreted the 'impartiality might reasonably be questioned' language of this canon" but that federal courts have interpreted similar language "in discussing the standard for determining whether a judge's recusal is required under the federal counterpart to the Utah rule, 28

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[2] See, e.g., Treff v. Hinckley, 2001 UT 50, ¶¶ 7-10, 26 P.3d 212 (reviewing judge's denial of two motions to disqualify); State v. West, 2001 UT App 275, 34 P.3d 234 (granting in part and denying in part extraordinary writ, under Rule 65B, Utah R. Civ. P., and Rule 19, Utah R. App. P., compelling one district judge to order another to disqualify himself); American Rural Cellular, Inc. v. Systems Communication Corp., 939 P.2d 185, 193-96 (Utah Ct. App. 1997) (reviewing denial of motion to disqualify); State v. Alonzo, 973 P.2d 975, 978-80 (Utah Ct. App. 1998) (reviewing denial of Rule 29, Utah R. Crim. P., motion to disqualify); In re Affidavit of Bias, 947 P.2d 1152, 1154 (Utah 1997) (Zimmerman, C.J., sitting alone) (reviewing legal sufficiency of affidavit of bias under Rule 63(b), Utah R. Civ. P.); State in the Interest of M.L., 965 P.2d 551, 556-57 (Utah Ct. App. 1998) (same).

U.S.C.A. § 455(a) (1993)." American Rural Cellular, Inc. v. Systems Communication Corp., 939 P.2d 185, 195 (Utah Ct. App. 1997). Citing federal decisions, this Court said "whether recusal is required does not depend on whether or not the judge actually knew of facts creating an appearance of impropriety; instead, recusal is required if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." Id. (citations omitted). This Court also described "the types of circumstances" that federal courts have said "warrant recusal[,]" including "when a judge has a direct personal or fiduciary interest in the outcome of the case, regardless of whether or not the judge is actually aware of that interest at the relevant times." Id. at 195-96 (citations omitted). If, however, "a case...involves remote, contingent, indirect or speculative interests, disqualification is not required." Id. at 196 (citations omitted).

This construction of Canon 3E's "impartiality might reasonably be questioned" language is in harmony with the requirement this Court imposed on Rule 63(b) bias affidavits; namely, "that the bias alleged in the affidavit 'have some basis in fact and be grounded on more than mere conjecture and speculation.'" State in the Interest of M.L., 965 P.2d at 556 (quoting Madsen v. Prudential Fed. Sav. & Loan, 767 P.2d 538, 544 n. 5 (Utah 1988)). "Furthermore, such bias may not be based solely on the fact that the judge has issued prior rulings adverse to the party making the allegation." Id. See also In re Affidavit of Bias, 947 P.2d at 1154 ("no deduction of bias and prejudice may be made from adverse rulings by a judge") (quoting 46 Am.Jur.2d *Judges* § 219 (1994)).

These cases make clear the error in appellants' reasoning. Rather than the "low threshold" appellant claims, the Code of Judicial Conduct requires disqualification only when there are concrete facts that reasonably create the appearance of bias. State in the Interest of M.L., 965 P.2d at 566; American Rural Cellular, 939 P.2d at 195-96. Remote, speculative, contingent, and indirect interests do not require disqualification, and allegations of bias may not be based solely on adverse rulings. Id.; In re Affidavit of Bias, 947 P.2d at 1154.

In light of this precedent, Judge Mower's conduct conformed to the Code of Judicial Conduct's requirements, and he correctly presided over this case. Appellants have not cited any factual evidence supporting their claim of bias. Any relationship Judge Mower developed during prior representation of one of the appellants[3] is indirect and remote from this case, and its possible effect on the proceedings, if any, can only be classified as speculative. Moreover, Judge Mower had no fiduciary interest in this case. As such, appellants' claim should be dismissed.

VII. CONCLUSION

Because appellants' brief does not comply with Rule 24, Utah Rules of Appellate Procedure, this Court should summarily affirm the trial court's rulings and award Jenkins Oil its attorney fees as provided in Rule 24(j). Moreover, Trout's and the Travel Center's

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[3] Appellants do not state which plaintiff Judge Mower previously represented. See Appellants' Br. at 7-8.

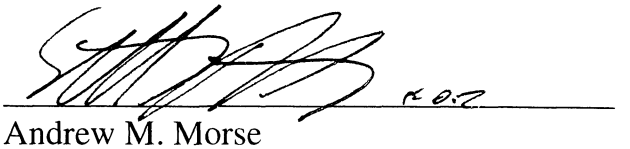
appeal is frivolous. This Court should therefore award Jenkins Oil its attorney fees under Rule 33(a), Utah R. App. P.

Judge Mower's order sanctioning Trout and the Travel Center under Rules 16(d) and 37(b)(2)(C), Utah Rules of Civil Procedure, was both warranted and well within his discretion. Appellants' willfully disregarded Judge Mower's warning and engaged in dilatory tactics, all to Jenkins Oil's prejudice. Enough is enough; the trial court's sanctions should be affirmed.

Additionally, Judge Mower obeyed both the spirit and the letter of Utah's Code of Judicial Conduct when he heard the case. Any relationship between Judge Mower and one of the plaintiffs was distant and not central to this trial; any alleged effect Judge Mower's prior representation had on this case is factually unsupported and speculative. This issue should be disregarded.

Respectfully submitted this 28th day of July, 2003.

SNOW, CHRISTENSEN & MARTNEAU



Andrew M. Morse

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CERTIFICATE OF SERVICE

I state that I am employed by the law firm of Snow, Christensen & Martineau, attorneys for defendant Jenkins Oil Company, Inc. herein; that I served the attached **APPELLEE JENKINS OIL COMPANY, INC.'S BRIEF;** (Utah Court of Appeals Case Number 20020557-CA) upon the party listed below by placing a true and correct copy thereof in an envelope addressed to:

Odean Bowler
Attorney at Law
205 E. Tabernacle, Suite 2
St. George, Utah 84770

and causing the same to be **mailed, first class**, postage prepaid, on the 28th day of July, 2003.

Kathy Tickett

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